SUPREME COURT, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 745

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ETC., ET AL.,

Petitioners,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE DARNELL-GIBSON PRINTING COMPANY, CHICAGO [illegible]-56

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Order of Railway Conductors and Brakemen, a voluntary association, individually and as representative of certain employees of the respondent represented by said organization, G. H. Harris, individually and as Vice President of said organization, and J. K. Hinks, individually and as Vice President of said organization, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on November 8, 1961.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix A hereto, *infra*, pp. 15-20, is reported in 296 F. 2d 453.

The Findings of Fact, Conclusions of Law, and Injunction Order of the District Court (pp. 89-100 of the Appendix in the Court of Appeals and filed herewith) is not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered November 8, 1961 (Appendix A, *infra*, p. 21). A petition for rehearing, timely filed, was denied on December 22, 1961 (Appendix A, *infra*, p. 22).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. In collective bargaining under the Railway Labor Act can an employer who tells the employees that it disagrees with the employees' interpretation and application of the language proposed by the employees to be added to the employment contract nevertheless accept the language over the protest of the employees and make the language part of the contract?

2. Is a dispute in Railway Labor Act collective bargaining as to the interpretation and application of language contained in a Section 6 notice (45 U. S. C. § 156) of the employees, can the employer merely accept the language and thus convert what had been a "major" dispute into a "minor" dispute and send the controversy to the National Railroad Adjustment Board (45 U. S. C. § 153) for compulsory arbitration?

3. In collective bargaining under the Railway Labor Act can the parties be held to have reached agreement without observance of the rules applicable to ordinary commercial contracts such as necessity for meeting of the minds and for execution of a writing when so intended by the parties?

4. Is the statutory "notice" of an intended change in the collective bargaining agreement required by Section 6 of the Railway Labor Act (45 U. S. C. § 156) an "offer" as that term is defined in the law of commercial contracts, or merely the statutory prerequire for bringing the parties together in bargaining sessions for the purpose of resolving their disputes?

STATUTES INVOLVED

The statutory provisions involved are sections 2, 3, and 6 of the Railway Labor Act (45 U. S. C. §§ 152, 153, and 156) printed in Appendix B. *infra*, pp. 23-24).

STATEMENT

This action was brought in the District Court to enjoin the carrying out of a strike by the railroad employees represented by the Petitioners on the Respondent's railroad. The strike was alleged to be unlawful under the Interstate Commerce Act (49 U. S. C. § 1, *et seq.*) and under the Railway Labor Act (45 U. S. C. § 151, *et seq.*).

After hearing on the merits, the District Court entered a permanent injunction from which an appeal was taken to the United States Court of Appeals for the Seventh Circuit. There the injunction order was affirmed.

There was no dispute as to the facts. The statement which follows, is all taken directly from the Findings of Fact made by the District Court (Appendix 89-96), or

from that Court's Conclusions of Law (Appendix 97-98), or from the Respondent's Complaint (Appendix 2-17).

In 1959 a dispute between the respondent carrier and its employees represented by the petitioner Order of Railway Conductors and Brakemen (hereafter called the Conductors) began with a request made by the Conductors to the carrier for a change in the collective bargaining agreement then in effect between the Conductors and the carrier governing rates of pay, rules, and working conditions of the employees in service as conductors represented by the labor organization. The request was initiated by a notice in the form of a letter, dated August 15, 1959, addressed by the Conductors to the carrier, which proposed an additional rule under Section 6 of the Railway Labor Act (45 U. S. C. § 156) as follows:

> "Please accept this letter as a formal Notice under the provisions of Section 6 of the Railway Labor Act to add to the current Agreement between the C. M. St. P. & P. Railroad, Lines West and the Order of Railway Conductors and Brakemen, the following rule:
>
> > 'Upon request of the Local Committee of Adjustment of the Order of Railway Conductors and Brakemen, conductors may be required to register miles made as a conductor during any pay period. It will not be the duty of conductors, either part time or regular, to register miles made working as a conductor with other than the Organization duly authorized in accordance with the terms of the Railway Labor Act to represent the Conductors craft and class.'
>
> "It will be appreciated if you will set a date for conference on this Notice, in line with provisions of Section 6 of the Act."

In the background of the dispute was a certain mileage agreement made effective February 1, 1957 between the carrier and the Brotherhood of Railroad Trainmen, rep

presentative under the Railway Labor Act of brakemen employees of the carrier. In practice, the mileage agreement forced an employee who held seniority as conductor and brakeman to accept the call to work as conductor, and then to have whatever miles he worked as a conductor applied to reduce the number of miles he could thereafter work as a brakeman. The subject matter of the Section 6 notice was discussed in detail by officers of the Conductors with the carrier in April 1959 and thereafter. The Conductors were attempting to negotiate some rule with the carrier which would eliminate the application of this mileage limitation by the carrier to men who worked as part time conductors. The Conductors suggested several solutions, including the formation of conductor extra boards.

After conference between the parties concerning the Notice of August 15, 1959 the carrier wrote the Conductors that the carrier did not agree that there is basis for the rule requested by the Conductors and that it is therefore declined. The Section 6 notice was not withdrawn by the Conductors. The carrier at all times was informed as to the objectives and application the Conductors sought to accomplish by their Section 6 notice but disagreed with the Conductors as to the interpretation and application to be given to it.

The National Mediation Board conducted mediation proceedings between the parties but was not successful in bringing them to agreement.

On November 18, 1960 a conference was had between the parties for further discussions of the dispute. Mr. Angour, representing the carrier, handed to the Conductors' officer a document entitled Memorandum of Agreement between the carrier and the Conductors which provided that the parties agreed to the language of the Section 6 notice and, in addition, contained the following words:

"This agreement, which is in full disposition of Section 6 Notice served on the Carrier by the Organization under date of August 15, 1959, is effective December 1, 1960 and will remain in effect subject to the provisions of the Railway Labor Act, as amended."

The document contained places for the signature of Mr. Amour and two officers of the Conductors.

In the discussion of the document which followed Mr. Amour stated that the words used did not mean the same thing to the carrier that they meant to the Conductors and that he did not think it would dispose of the dispute that they had discussed during the months of conferences, because he thought that the carrier had one interpretation of what the document meant and the Conductors had another interpretation of what it meant. Mr. Amour recognized that the parties "were in disagreement."

The officer of the Conductors stated to Mr. Amour that the proposal which he had given was not acceptable to the Conductors. The Conductors' officer suggested that perhaps he could write out something, in longhand, which would be a basis of agreement. He did so, handed it to Mr. Amour, and asked whether this would be a basis for settling the dispute. Mr. Amour stated that he was not in a position to say and that he would let the Conductors' officer know later.

The conference of November 18, 1960, was concluded with the understanding that the parties would get in touch with each other later, the tentative agreement being to meet again on November 23, 1960.

The Memorandum of Agreement proposed by Mr. Amour on November 18, 1960, was never signed by the carrier or by the Conductors.

On November 20, 1960, the Conductors telegraphed Mr. Amour, with respect to the Section 6 notice, in part as follows:

> "It is further evident that Carrier representatives refuse to interpret that language within the context of the dispute and that your acceptance of that language is nothing more than a sham and technical method of avoiding the basic issue by closing out on notice without settlement."

On November 21, 1960, Mr. Amour replied that the carrier is willing to enter into an agreement containing language proposed in the Section 6 notice served on the Carrier on August 15, 1959.

On November 22, 1960, Mr. Amour wrote the Conductors:

> "This will confirm advice in telegram to Mr. Paddock [President of Conductors] yesterday that the following rule proposed in your Section 6 Notice of August 15, 1959 is accepted by the carrier effective at once."

On November 27, 1960, the Conductors called a strike, to begin December 4, 1960.

Mr. Amour met again with the officer of the Conductors on November 29, 1960 to try to solve the problem, at which time Mr. Amour rejected the proposal which had been written out in longhand and handed by the Conductors' officer to Mr. Amour on November 18, 1960.

On December 12, 1960 the carrier filed an *ex parte* submission to the National Railroad Adjustment Board, First Division, based on the theory that the carrier and the Conductors had entered into a formal contract on November 22, 1960 by means of the letter of Mr. Amour of that date addressed to the Conductors.

In its Complaint in the District Court the carrier took the position that on November 18, 1960 it accepted the Conductors' proposal, thus finalizing the contract. The District Court agreed and held that the carrier had accepted the Conductors' proposal for a rule change and that there

after this became a part of the collective bargaining agreement between the parties.

REASONS FOR GRANTING THE WRIT.

1. The opinion of the Court of Appeals for the Seventh Circuit misunderstands the nature of collective bargaining. To quote from page 4 of the opinion:

> "That the parties indicated differences in its [the language of the Conductors' original Section 6 Notice] interpretation and application and disagreed as to its effect discloses only a lack of meeting of minds as to its meaning and effect—not on whether it was to be added to the agreement."

Again, at pages 4-5 of the Opinion the Court said:

> "That plaintiff's acceptance of the addition to the agreement did not resolve all controversy as to its meaning and effect did not prevent the contract change or addition from becoming effective."

The Court's opinion implies that, during the collective bargaining process, *words* can be divorced from their *meaning* and that acceptance by one of the parties of the words contemporaneously with a denial as to their meaning brings the parties to "agreement" and resulting compulsory arbitration by the National Railroad Adjustment Board.

The opinion of the Court of Appeals overlooks the language of this Court in *National Labor Rel. Bd. v. Sands Mfg. Co.*, 306 U. S. 332. To quote from page 342 of the decision:

> "Second. The Board held that respondent violated the application imposed upon it by the statute to bargain collectively with representatives of its employees. The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties

should be made. But we assume that the Act imposes upon the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract *and also to discuss with them its true interpretation, if there is any doubt as to its meaning.* Upon this basis the respondent was not deficient in the performance of its duty." (Italics added.)

2. The opinion of the Court of Appeals interprets the Railway Labor Act (45 U. S. C. § 151, *et seq.*) in such a manner as to create doubt and confusion in collective bargaining under that Act.

Specifically, the opinion appears to hold that an unresolved controversy between a carrier and its employees as to language concerning "an *intended* change in agreements affecting rates of pay, rules, or working conditions," initiated by a Section 6 notice under the Railway Labor Act (45 U. S. C. § 156) given by one of the parties, may be referred by the other party to the National Railroad Adjustment Board (45 U. S. C. § 153) for compulsory arbitration. (Italics added.)

Heretofore the jurisdiction of the National Railroad Adjustment Board has been understood to be limited to disputes "growing out of grievances or out of the interpretation or application of *agreements* concerning rates of pay, rules, or working conditions . . ." (45 U. S. C. § 153 First (i). (Italics added.)

If the jurisdiction of the National Railroad Adjustment Board is to be extended to include compulsory arbitration of unsettled disputes concerning *proposed* changes in agreements affecting rates of pay, rules, or working conditions, free collective bargaining under the Railway Labor Act will be destroyed.

Other courts have uniformly rejected the efforts of both unions and railroad managements to claim that somehow

in the course of collective bargaining "major" disputes had been transformed into "minor" disputes or vice versa; see *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.*, 9 Cir., 268 F. 2d 54, 59; *Norfolk & P. B. L. R. Co.* v. *Brotherhood of Rail. Train.*, 4 Cir., 248 F. 2d 34, 43, 45-46; and see also *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330, 341. The opinion of the Court of Appeals for the Seventh Circuit ignores the holdings of these cases.

3. The opinion of the Court of Appeals does not assert that under rules for the making of ordinary commercial contracts no meeting of the minds is necessary. Nor does the Court's opinion declare that a contract may be formulated without the signing by the parties of a written agreement, even though the carrier's representative obviously thought that such signatures would be necessary when he handed a written agreement, with places for signatures, to the Conductors' representative at the meeting on November 18, 1960. Thus the Court of Appeals opinion has established a rule for reaching agreement in collective bargaining which is contrary to that for reaching agreement in commercial contracts.

4. The Section 6 notice (45 U. S. C. § 156) is not an "offer" as that term is used in the law of commercial contracts but rather is the statutory procedure for bringing the parties together in bargaining sessions for the purpose of resolving their disputes.

For that reason the opinion of the Court of Appeals misconceives the legal effect of the parties' continued discussion of the subject matter of the Section 6 notice. At page 5 of its opinion the Court says:

> "The proposal submitted by Conductors was specific in its terms—the addition of a provision to the collective bargaining agreement in language specifically set forth. At no time was this specific proposal withdrawn or another substituted in lieu thereof."

The opinion ignores the fact that, even after the rejection of the proposal by the carrier, both parties were required by the Railway Labor Act to *continue* their efforts to settle the dispute which was the subject of the Section 6 notice. To quote from 45 U. S. C. § 152 First:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The Section 6 notice would not be construed as an "offer" even under principles governing the law of commercial contracts. American Law Institute Restatement of the Law of Contracts (1932), § 25; 12 Am. Jur. (1938 ed.), § 28 at page 526 wherein it is said:

> "If a proposal is one merely to open negotiations which may or may not ultimately result in a contract, it is not binding though accepted. An invitation to enter into negotiations is not an offer which, together with the acceptance thereof, forms a contract."

In the present case the carrier and its employees had been conferring about mileage limitation penalties assessed against part-time conductors. The Conductors, as representative of such employees, were attempting to negotiate a rule with the carrier which would correct the situation.

The Conductors were mindful of Section 6 of the Railway Labor Act (45 U. S. C. § 156) that "... representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference, between the representa-

tives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice."

To comply with the statute and to have a basis for beginning the discussions, the Conductors in their Section 6 notice tried their hand at some language.

In the conferences which followed the carrier stated openly that it disagreed with the Conductors as to the meaning of the language suggested by the Conductors, that the words would not settle the dispute, but that the carrier would accept them. Over the protest of the Conductors the carrier declared that it accepted the words and at once referred the dispute to the National Railroad Adjustment Board for compulsory arbitration.

In the light of the opinion of the Court of Appeals, and applying hindsight, how could the Conductors have avoided this compulsory arbitration?

Perhaps the Section 6 notice sent by the Conductors should merely have advised the carrier that the Conductors wished to negotiate a rule which would eliminate mileage limitation penalties against part time conductors, and stopped there.

If the Conductors had given such a notice, then it is reasonable to suppose that in the conferences which followed the carrier's first question would have been:

"You started this; what language do you propose?"

Under the principle of the Court's opinion the defendants should then have replied:

"We can't tell you, because you may say that you disagree with the meaning of our words but that you will accept them, and then you will send the dispute to compulsory arbitration."

The opinion of the [illegible] Appeals [illegible] that w[illegible] representatives of employees are [illegible] collective [illegible] bargaining under the Railway Labor Act they must [illegible] only words which they are willing to [illegible] to state [illegible] even when the carrier [illegible] to the employees that [illegible] disagrees with the [illegible] of the words.

Such a harsh rule is [illegible] to the [illegible] contra[illegible]

Why should such a rule be injected into the [illegible] more difficult area of collective bargaining under the R[illegible] way Labor Act?

CONCLUSION

The United States Court of Appeals for the Sev[illegible] Circuit has decided an important question concerning [illegible] of collective bargaining under the Railway La[illegible] Act. That question has not been but should be settle[illegible] this Court.

For the foregoing reasons it is prayed that the Pet[illegible] for a Writ of Certiorari be granted.

Respectfully submitted,

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February 20, 1962

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1961. September Session, 1961

No. 13344

Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
Plaintiff-Appellee

v.

Order of Railway Conductors and Brakemen, etc., et al.,
Defendants-Appellants

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 8, 1961

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. The plaintiff-appellee, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, brought this action in the District Court to enjoin defendants-appellants[1] from carrying out a strike, alleged to be unlawful, on plaintiff's railroad. After a hearing on the merits and the entry of findings of fact and conclusions of law the court entered a permanent injunction

[1] Defendants-appellants are the Order of Railway Conductors and Brakemen and certain of its officers sued individually and as representatives of the class of employees represented by such association and labor organization.

against the defendants enjoining a strike. Defendants appealed.

The defendants assert that there is no dispute concerning the facts but contend that the court erred in its conclusions of law. The parties are in agreement that the nature of the dispute giving rise to the proposed strike is determinative of the District Court's jurisdiction to enter the permanent injunction.[2] The contested issue which emerges from defendants' appeal is whether on the unassailed findings of fact the court erred in concluding that the dispute over which a strike was threatened is a "minor dispute"; *i. e.* one subject to compulsory arbitration procedures under the Railway Labor Act[3] and to binding decision by the National Railroad Adjustment Board. The District Court does have jurisdiction to enjoin such a strike. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U. S. 30.

Pertinent facts as disclosed by the findings of fact made by the District Court are that on August 15, 1959 the defendant Order of Railway Conductors and Brakemen[4] gave formal notice to plaintiff of a proposed addition to the collective bargaining agreement then in effect between the parties. The intended change, submitted pursuant to Section 6 of the Railway Labor Act,[5] was to add the following provision to the agreement:

> "Upon request of the Local Committee of Adjustment of the Order of Railway Conductors and Brakemen, conductors may be required to register miles made as a conductor during any pay period. It will not be the

2 *Brotherhood of Railroad Trainmen v. Chicago & Indiana Railroad Co.*, 353 U. S. 30; *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U. S. 330.

3 45 U. S. C. A. § 153.

4 Hereafter sometimes referred to as "Conductors" which term will also include its representatives.

5 45 U. S. C. A. § 156.

duty of conductors, either part time or regular, to register miles made working as a conductor with other than the Organization duly authorized in accordance with the terms of the Railway Labor Act to represent the Conductors craft and class."

In the background was a mileage agreement between the plaintiff railroad and another union which represented brakemen. The mileage agreement placed a limitation of 4,000 miles a month on employee earnings. It required registration of all miles worked. As to employees holding seniority as conductor and brakeman and required to accept a call to work as conductor the agreement, in practice, had the effect of applying miles worked as a conductor to reduce the number of miles such an employee could thereafter work as a brakeman.

After a conference between the parties the plaintiff on September 14, 1960 advised Conductors that it did not agree there is a basis for a rule such as requested by you and it is therefore declined." Conductors did not withdraw the proposal and the parties continued to confer and negotiate concerning the same. Conductors declined arbitration after assistance of the National Mediation Board, applied for by Conductors, had failed to resolve the matter. During conference it was indicated by a representative of plaintiff that the parties disagreed as to the interpretation and application of the proposed provision that the words used did not mean the same thing to the plaintiff that they did to Conductors and that plaintiff had one interpretation and Conductors another. Following a conference on November 18, 1960, which had concluded with a tentative understanding to meet again November 23, 1960 plaintiff on November 22nd wrote Conductors that the August 15, 1960 proposal "is accepted by the carrier effective at once." Telegrams subsequently exchanged between the parties indicate a dispute as to the

meaning and effect of the provision set forth in the August 15, 1959 notice and on December 12, 1960 plaintiff filed an ex parte submission to the National Railroad Adjustment Board, First Division.

Defendants contend, in substance, that the disagreement which arose over the meaning and interpretation of the language set forth in the August 15, 1959 notice evidences such lack of "meeting of minds" that no change in the collective bargaining agreement was effected either under the provisions of the Railway Labor Act or the general principles of contract law and further, that plaintiff's initial rejection of the proposed addition precluded a later acceptance without the renewed consent of Conductors. Defendants urge that, consequently, the controversy which existed at the time of the proposed strike was not a "minor dispute" but was a dispute over making a change in or addition to a collective bargaining agreement—a "major dispute".

The existence of a major dispute, disagreement in the bargaining process for a new or changed contract, which is the basis of a threatened strike precludes jurisdiction in the District Court to enjoin such strike. *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U. S. 330. But we are of the opinion that the District Court did not err in concluding that the threatened strike was over a minor dispute and its jurisdiction to grant injunctive relief not precluded by the Norris-LaGuardia Act.[6] The proposal submitted by Conductors was specific in its terms—the addition of a provision to the collective bargaining agreement in language specifically set forth. At no time was this specific proposal withdrawn or another substituted in lieu thereof. That the parties indicated differences in its interpretation and application and disagreed as to its effect discloses only a lack of

[6] 29 U. S. C. A. § 101 and § 104.

meeting of minds as to its meaning and effect not as to whether it was to be added to the agreement. And although plaintiff initially declined to accept the provision it ultimately did. Conductors by its continued participation for more than a year in conferences and negotiations with reference to the proposed addition, after plaintiff's initial rejection and without withdrawal thereof, or notifying plaintiff of a different and substituted "intended change", implicitly invited plaintiff's reconsideration of its earlier rejection and consented to a late acceptance.

We emphasize that although Conductors had knowledge of the disagreement over the meaning of the language it sought to add to the agreement at no time did it substitute language to eliminate question as to the interpretation of the provision. Therefore, Conductors and defendants are not in a position to complain of the acceptance of the "intended change" in the form Conductors proposed.

That plaintiff's acceptance of the addition to the agreement did not resolve all controversy as to its meaning and effect did not prevent the contract change or addition from becoming effective. After plaintiff's acceptance no dispute remained which was a dispute about the making of a new or changed contract. The dispute was the application of the agreed provision and language Conductors requested was added and the provision became a part of the collective bargaining agreement.

The threatened strike was over a dispute as to the "interpretation or application" of the agreement, a matter

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7. At the November 1st meeting plaintiff's representative refused to give Conductors a written response to the offer. Plaintiff agreed to the provision set out in the August 15, 1959 notice (the full description of that notice making the effective December 1, 1959). Plaintiff's representative did, however, advise that this was not acceptable as long as it was coupled with the version of a provision which would require a basis of settling the dispute. We do not regard these actions as effecting a substitution of such version as Conductors' "intended change" or as a withdrawal of the provision contained in the notice.

within the purview of § 3(i)-(m) of the Railway Labor Act and the narrowly confined limits of the exception to the ban of Norris-LaGuardia. The District Court did not err in concluding that it had jurisdiction to enjoin the strike in order to enforce compliance with the Railway Labor Acts' requirement that minor disputes be heard by the Adjustment Board.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, November 8, 1961

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.
Hon. Latham Castle, Circuit Judge.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, *Plaintiff-Appellee*, vs. No. 13344 Order of Railway Conductors and Brakemen, etc., *et al.*, *Defendants-Appellants*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Friday, December 22, 1961.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.
Hon. Latham Castle, Circuit Judge.

Chicago, Milwaukee, St. Paul and Pacific Railroad Co., a corp., *Plaintiff-Appellee*, *vs.* No. 13344 Order of Railway Conductors and Brakemen, etc., *et al.*, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition of defendants-appellants for rehearing of this cause be, and it is hereby, DENIED.

APPENDIX B

Statutes Involved.

Railway Labor Act (45 U. S. C. § 151, *et seq.*):

§ 152. First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

§ 153. First. (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

§ 156. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended

change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 745

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, etc., et al.,

Petitioners,

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 745

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, etc., et al.,

Petitioners,

vs.

CHICAGO, MILWAUKEE, ST. PAUL, AND PACIFIC RAILROAD COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, as reported in 296 F. 2d 453.

The Findings of Fact, Conclusions of Law, and Injunction Order of the District Court, appearing in the Appendix in the Court of Appeals and filed by Petitioners herein are not officially reported.

JURISDICTION

The judicial requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Should this Court grant certiorari to review the concurrent findings of fact made by the District Court and the Court of Appeals that the dispute over which a strike was threatened is a "minor dispute", one subject to compulsory arbitration procedures under the Railway Labor Act and to binding decision by the National Railroad Adjustment Board?

STATUTE INVOLVED

The statutory provisions involved are Sections 2, 3 and 6 of the Railway Labor Act (45 U.S.C. §§ 152, 153 and 156) and set forth on pages 23 and 24 in the Petition.

STATEMENT

On August 15, 1959, the Petitioners, Order of Railway Conductors and Brakemen, *et al.*, gave formal notice to Respondent of a proposed addition to the collective bargaining agreement then in effect between the parties. The intended change, submitted pursuant to Section 6 of the Railway Labor Act, *was to add the following provision* to the agreement: (Italics added)

> "Upon request of the Local Committee of Adjustment of the Order of Railway Conductors and Brakemen, conductors may be required to register miles made as a conductor during any pay period. It will not be the duty of conductors, either part time or regular, to register miles made working as a conductor with other than the Organization duly authorized in accordance with the terms of the Railway Labor Act to represent the Conductors craft and class."

In the background was a mileage agreement between the Respondent Railroad and another union which represented brakemen. The mileage agreement placed a limita-

tion of 4,000 miles a month on employee earnings. It required registration of all miles worked. As to employees holding seniority as conductor and brakeman and required to accept a call to work as conductor, the agreement, in practice, had the effect of applying miles worked as a conductor to reduce the number of miles such an employee could thereafter work as a brakeman.

After a conference between the parties, the Respondent on September 14, 1959, advised Conductors that it did "not agree there is a basis for a rule such as requested by you and it is, therefore, declined". Conductors did not withdraw the proposal and the parties continued to confer and negotiate concerning the offer contained in the Section 6. Notice dated August 15, 1959.

At a meeting of the representatives of the parties on November 18, 1960, the proposal made by the Conductors was accepted by the carrier.

On November 27, 1960, the Conductors called a strike to begin on December 4, 1960, without submitting the dispute as to the interpretation of the agreement to the National Railroad Adjustment Board.

On December 12, 1960, the carrier filed an *Ex Parte* Submission, as provided for by the Railway Labor Act, to the National Railroad Adjustment Board, First Division, where it and the Conductors' Submission is now pending.

Injunctive relief was sought and granted by the District Court and affirmed by the United States Court of Appeals for the Seventh Circuit.

REASONS FOR DENYING THE WRIT.

Petitioners are merely asking this Court to review facts. We respectfully suggest that this Petition falls within the purview of the language in the case of *Gracey Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, p. 275, which indicates that this Court should not undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error.

Petitioners suggest that the Court of Appeals for the Seventh Circuit misunderstood the nature of collective bargaining and interprets the Railway Labor Act in such a manner as to create doubt and confusion. The theme of their argument is best summed up by the following words used in the Petition:

> "The court opinion *implies*"
> (Italics added) (p. 8 of Petition)
>
> "Specifically the opinion *appears* to hold"
> (Italics added) (p. 9 of Petition)

The Court of Appeals for the Seventh Circuit held on page 5 of their opinion that the threatened strike was one over a dispute as to the interpretation or application of the agreement. (p. 19 of Petition)

The District Court in its Conclusions of Law and Injunction Order (Petitioners' Appendix 97-100) found that the proposal for a rule change was accepted and the dispute between the parties concerned the interpretation of the existing contract.

The Court of Appeals for the Seventh Circuit in their opinion implied nothing but specifically held this to be a "minor dispute" and followed this Court's holding in the case of *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R. R. Co.*, 353 U.S. 30.

The issue in this case is one of fact. Was a contract entered into by the parties? It is basic in contract law that whether a contract has been entered into is a fact question. Both courts below considered the facts and both found a contract did exist.

Petitioners suggest a conflict in the decision of the Court of Appeals for the Seventh Circuit in this case and that in the cases of *Butte, Anaconda & P. Ry. Co. v. Brotherhood of L. F. & E.*, 9 Cir., 268 F. 2d 54, 59; *Norfolk & W. R. R. Co. v. Brotherhood of Ry. Train.*, 4 Cir., 248 F. 2d 34, 43, 45, 46; *Railroad Telegraphers v. Chicago & N. W. R. Co.*, 362 U. S. 330, 341.

In each of the aforesaid cases proposals were submitted pursuant to Section 6 of the Railway Labor Act, but never were they accepted by the parties to whom they were made.

In the instant case the two lower courts have specifically found the existence of a contract, the interpretation of which is in dispute. Therefore, the cases cited by Petitioners are not governing and it is clear that there is no conflict between this case and the decisions of other circuits.

Petitioners make a generalization that a Section 6 Notice is not an offer but part of the statutory procedure to bring parties together to enter into new or additional agreements. Petitioners, however, ignore the Notice which they served on the carrier in this case. This Notice was more than a device to begin collective bargaining. The Petitioners in this Notice did more than try their hand at some language, they told the Respondent exactly what they sought.

Who should know better than the parties asking for something what they want. This has been the beginning of every contract negotiation.

Petitioners are attempting to make "collective bargaining" a strange and mysterious thing, while actually it means nothing more than contract negotiations. Congress realized this when it enacted the Railway Labor Act and formulated a procedure to bring order to contract negotiations in an industry of such importance as the railroad industry. Importance from the standpoint of the public! The interpretation which the Petitioners seek to put on the findings of the lower courts will bring chaos to the procedure of the Railway Labor Act.

The dispute in its basic facts is simple. The petitioners wanted something—they got it. They did not like what they asked for after it was given them and now are seeking to upset it. What procedure should be followed if this is the end they seek? A new Section 6 Notice should be filed and then the procedure covering contract negotiations in the railroad industry should be followed.

In any contract there are terms that cause misunderstanding between the parties and the interpretation of these terms has been the basis of many lawsuits before the courts over the years. Congress when it enacted the Railway Labor Act and established the National Railroad Adjustment Board took the interpretation of contracts, whose terms were peculiar to the industry, and placed it in a tribunal having unequivocal jurisdiction to finally and completely decide the issues. The injunctive processes of the federal courts, as upheld by this Honorable Court, have time and again enforced the jurisdiction of this administrative body.

CONCLUSION

It is respectfully suggested to this Honorable Court that certiorari should be denied because the Petitioners are merely asking this Court to review a concurrent finding of fact made by the two courts below without a showing of error and without a showing of conflict among the decisions of the lower courts.

Respectfully submitted,

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ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ETC., ET AL.,

Petitioners,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 745.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ETC., ET AL.,

Petitioners,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

The respondent attempts to persuade the Court that the petitioners seek certiorari merely to review *findings of fact* made by the lower courts. The respondent thus states the QUESTION PRESENTED, at page 2 of its brief:

> "Should this Court grant certiorari to review the concurrent findings of fact made by the District Court and the Court of Appeals that the dispute over which a strike was threatened is a 'minor dispute', one subject to compulsory arbitration procedures under the Railway Labor Act and to binding decision by the National Railroad Adjustment Board?"

At page 4 of its brief the respondent thus begins its REASONS FOR DENYING THE WRIT:

> "Petitioners are merely asking this Court to review facts. We respectfully suggest that this Petition falls within the purview of the language in the case of *Graver Mfg. Co. v. Linde Co.*, 336 U. S. 271, p. 275, which indicates that this Court should not undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error."

The District Court did *not* make a finding of fact that the dispute over which a strike was threatened is a "minor dispute" (FINDINGS OF FACT made by the District Court (pp. 89-96 of the Appendix in the Court of Appeals and filed herein). In its CONCLUSIONS OF LAW the District Court held that the dispute involved in the Section 6 notice was a major dispute under the Railway Labor Act and that the carrier on November 18, 1960, accepted the proposal for a rule change submitted to it by the Union, and that thereafter this agreement became a part of the collective bargaining agreement between the parties (Appendix in the Court of Appeals, p. 97). In the District Court's INJUNCTION ORDER which followed the Court found, again, that the carrier on November 18, 1960, accepted the proposal for a rule change and that thereafter this agreement became a part of the collective bargaining agreement between the parties. The District Court further held that the dispute between the parties is a minor dispute within the meaning of the Railway Labor Act (Appendix in the Court of Appeals, pp. 98-99).

Obviously this was *not* a finding of fact but, instead, a conclusion of law by the District Court.

So far as the Court of Appeals is concerned, its opinion stated:

> "The contested issue which emerges from defendants'

> appeal is whether on the unassailed findings of fact the court erred in concluding that the dispute over which a strike was threatened is a 'minor dispute'? * * *" (Petitioners' Petition For a Writ of Certiorari in this Court, p. 16).

Again, the Court of Appeals declared:

> "But we are of the opinion that the District Court did not err in concluding that the threatened strike was over a minor dispute. * * *" (Petitioners' Petition for a Writ of Certiorari in this Court, p. 18).

The case cited by the respondent, *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U. S. 271, at page 275, refers to the rule which "requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings." In the present case there was no "conflicting testimony" and there was no dispute as to the facts.

The present petition for a writ of certiorari questions conclusions of law reached by the lower courts on undisputed testimony.

Finally, the respondent would have this Court believe that the collective bargaining was limited to whether the carrier should accept the language contained in the Section 6 Notice. As the respondent states at page 3 of its brief:

> "Conductors did not withdraw the proposal and the parties continued to confer and negotiate concerning the offer contained in the Section 6 Notice dated August 15, 1959."

The District Court made this finding of fact:

> "The *subject matter* of the Section 6 notice was discussed in detail by officers of the Conductors with the plaintiff carrier in April 1959 and thereafter." (Appendix in the Court of Appeals, p. 91) (Italics supplied).

The all-important facts on which this petition is based are these:

1. The language of the new contract provision contained in the Section 6 notice meant one thing to the employees who proposed it and another thing to the carrier.

2. The carrier's purported acceptance of this language did not settle the subject-matter of the dispute.

These facts were not and are not contested. The question presented is whether, as a matter of law, in collective bargaining under the Railway Labor Act the words of proposed contract changes are a thing apart from the meaning of those words in the minds of the parties as declared by them during negotiations, so that the parties may make binding contract changes without having achieved any meeting of the minds as to settlement of the subject matter of the dispute.

The decision below, in that it holds that words can be thus divorced from their declared meaning in collective bargaining under the Railway Labor Act, should be reviewed.

Respectfully submitted,

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